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As the Commission has noted. “the cable operator either ~~originates~~ or selects almost all of the programming” viewed in the market. As a result, cable system operators have virtually unbridled discretion to control or limit viewpoint diversity, without governmental interference. The recent highly-publicized dispute in Fairfax County, Virginia, over carriage of ~~WJLA~~ and NewsChannel8, highlights the control cable operators have over ~~the~~ access of local cable news channels to their viewing audience. If the Commission has a concern for viewpoint diversity in today’s media marketplace, it should focus on the viewpoint gatekeeper, the cable system operator. not on the publisher of the local newspaper.

**C. The cost of newsgathering has increased dramatically for all media, and the cost of other programming has greatly affected independent stations.**

At the same time market share is declining and competition increasing for traditional media, the cost of newsgathering has grown exponentially. Today more ~~than~~ ever, the news of the day requires complex coverage of international events and intensely local coverage ~~of community~~ affairs. The war in Afghanistan is relevant to every American ~~and~~ coverage in that region is difficult and costly. The belief in 1975 that independent over-the-air stations could provide this global coverage is folly. Today, only the broadcast networks, cable news networks and newspapers have the resources to provide comprehensive coverage of ~~national~~ and international events.

At the same time. traditional ~~core~~ cities and ~~suburbs~~ have given way to sprawling, multi-county metropolitan areas, requiring larger news staffs to cover the local events. More than any other medium, newspapers are committed to the huge and expensive undertaking of reporting ~~on the~~ hundreds of municipal government boards, local school boards and other public bodies. In Chicago, the ~~Chicago~~ Tribune employs 650 editorial staffers and hundreds of ~~freelance~~ writers — hundreds more than any other news organization — to cover these local stories. <sup>159</sup> In addition to these labor costs,

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<sup>159</sup> Current newsroom staffing at Tribune newspapers: *Los Angeles Times*, 1,130; *Chicago Tribune*, 650; *Newsday*, 556; *The Hartford Courant*, 340; *South Florida Sun-Sentinel*, 346.

newspapers have invested heavily in plant and equipment to offer zoned editions that do justice to local news across large areas.

On the broadcast side, it will cost WGN-TV \$14 million in 2001 to produce 27 hours of news a week in Chicago. This cost includes 21 reporters and anchors, photographers, editors, producers and other news-related staff, as well as several microwave and satellite trucks, and a helicopter to cover news throughout the Chicago area. Tribune's KTLA in Los Angeles will spend \$18.9 million and WPIX in New York will spend \$14.7 million.

The cost of entertainment programming has grown even more dramatically and is further draining resources at many broadcast stations. In 1975, without competition from cable operators, first-run entertainment programming was developed largely for the three existing networks. At that time, the number one television program was *All in the Family*, which cost about \$90,000 per episode to produce.<sup>160</sup> Today, seven networks compete for hit programming and cable operators use their dual revenue streams to acquire top-rated syndicated programming and produce award-winning original content. Today's prime-time leader, *ER*, airs for \$13 million per episode.<sup>161</sup> Syndicated shows, once independent television's programming mainstay, now also appear in cable's domain. The same can be said for sports. And cable's success in developing content can be seen in the 2001 Emmy Awards, where *Sex and the City* won the best comedy award and cast members of *The Sopranos* won awards for outstanding lead actor and actress in a drama series.<sup>162</sup>

#### IV. IN A FRAGMENTED WORLD, THE RULE HARMS DIVERSITY.

Tribune's experience in this fragmented media environment illustrates how ownership of a newspaper and one or more broadcast stations in a market enhances viewpoint diversity,

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<sup>160</sup> Robert LaFranco, *A Rich History*, *Forbes*, Sept. 21, 1998, at 210.

<sup>161</sup> See, Jim Rutenberg and Bill Caner, *NBC Ponders Its Options: Grow or Else*, *N.Y. Times*, May 14, 2001, at C1.

<sup>162</sup> Outstanding Lead Actor in a Drama Series: James Gandolfini as Tony Soprano; Outstanding Lead Actress in a Drama Series: Edie Falco as Carmela Soprano. See, [www.emmy.com](http://www.emmy.com).

encourages superior journalism, expands the amount of local news and public-interest programming available, and creates a more competitive media landscape. Today, the Rule is not only unnecessary, but actually harms the diversity of viewpoints it professes to protect.

**A. The Rule is unnecessary.**

- 1. The challenge for any media company competing in the American marketplace today is not about dominating the local market. The challenge is to be heard at all.**

The breadth of competition in the video programming market is reason enough to repeal the Rule. Today's cable channels often enjoy higher local audience shares than broadcast stations. For example, in New York, 33 cable channels earn a share of one or higher. and cable's Nickelodeon earns a television household share of six - equal to Fox's WNYW and UPN's WWOR , and greater than Paxson's WPXN, Telemundo's WNJLJ, and Univision's WXTV . In Los Angeles, 28 cable channels earn a share of one or above - a rating equal to or greater than 18 over-the-air stations. In each of Chicago and South Florida, fully 28 cable channels earn a share of one or higher. In Hartford, 36 cable channels earn a share of one or higher and Nickelodeon and the Cartoon Network each reach more television households than Tribune's WTXX, Univision's WUVN, UPN's WCTX and two other stations. AU of these cable services compete with broadcast stations for audience and for the broadcasters' only source of revenue - advertising.

In analyzing marketplace diversity today, any count of the number of voices must include each available cable network, as well as all newspapers, radio, television, Internet and other video delivery systems available to consumers in the market. It is simply illogical to continue to count only broadcast stations in any market analysis and disregard a cable channel that is being watched by more people. As the Commission recognized when it relaxed the One-to-a-Market rule in 1999, daily newspapers and cable systems "are an important source of news and information on issues of local

concern and compete with radio and television, at least to some extent, **as** advertising outlets.”<sup>163</sup>

Similarly, there is no reason to ban combinations with daily newspapers, while permitting combinations with weekly newspapers that have greater circulation and readership

Moreover, given the multiplicity of outlets of information, opinion and entertainment available to the public, the combination of one newspaper and one or more broadcast stations will have no more than a *de minimus* impact on the range of views available in any market. Add the weekday circulation of *Newsday* (577,354) to the **number** of television homes watching the average WPIX late evening local newscast (201,132<sup>164</sup>) and the result is still a small fraction of the total New York metropolitan area. The **same** calculation holds true in each of the other markets where Tribune owns a television station and a newspaper. It is ridiculous to conclude that merely by owning a newspaper, Tribune or anyone else might control a disproportionate or unacceptable share of the marketplace of ideas.<sup>165</sup>

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<sup>163</sup> Television Ownership Report and Order, 14 FCC Rcd. at 12953 (¶ 57).

<sup>164</sup> Number of television households in the New York DMA (6,935,610) x rating of WPIX late local newscast (2.9%). See discussion of the New York market. above.

<sup>165</sup> The Commission's conclusion in its 1998 biennial review that a commonly-owned broadcast station and newspaper cannot produce true diversity to the **same** extent **as** two media outlets that are “antagonistically run” is irrelevant, even if it were not. See, 1998 Biennial Regulatory Review, 15 FCC Rcd. 11058, 11100 (2000).

To another point, the Commission observes in the Notice that broadcast stations and newspapers were **once** viewed as the gatekeepers in the local marketplace of ideas. NPRM ¶ 17. This argument is outdated. It presages the fear that **only** through the megaphone of broadcast media can an individual speak to the mass market. This long-outdated notion is based on the same premise that led to the Fairness Doctrine - that regulation of speech is justified by the need to fairly ration the limited technology means available. But just as the Fairness Doctrine has dissolved, so, too, should this argument as applied to newspaper-broadcast common ownership. See, Inquiry Into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 FCC 2d. 142 (1985) (“Inquiry Into the Fairness Doctrine”)

First, the power of the newspaper or broadcast station to act as gatekeeper is diminished by the number of outlets and the myriad of viewpoints available. The proverbial town square has been replicated on the Internet where any individual can go online at any time and speak to the world. The Internet offers a powerful microphone at the hands of the many. Local community groups post notices and speak to their membership via the Web. Sports teams have individual Web sites to tell the story of their season. Political candidates have Web sites that communicate their message to the electorate. And in chat rooms

2. The ~~market~~ - not proscriptive regulation - is the best guarantor of ~~viewpoint~~ diversity.

Before signing up a single subscriber, **DBS** providers invested millions of dollars in technology based on the insatiable appetite for diverse programming in America, both urban and rural. Similarly, cable systems have invested billions of dollars in new technology to provide hundreds of channels ~~on~~ new digital platforms. America's demand for diverse programming justifies investments that were unfathomable ~~in~~ **1975**. These outlays also evidence a paradigm quite different from the supposition of the Rule's authors: Consumers control the programming provided to them. *Chairman Powell* has hit ~~on~~ the reason for ~~this~~:

One is hard pressed, however, to see why, in a healthy marketplace, if the public values local programming, producers would not supply it. If a local audience desires a program, and is willing to watch the program, that program will attract advertising dollars and thus a station or network will have an incentive **to** produce and provide that show. Indeed, since most consumers purchase advertised product in their local towns **and** communities, advertisers - even national ones with local franchises - would favor programs that appeal to local audiences.'"

**As** consumers demand programming directed to their interests, ~~media~~ must comply to remain relevant to advertisers. Gone are the days when consumers were beholden ~~to~~ three networks for their programming choices. The unregulated environment of cable programming ~~today~~ contains a cornucopia of targeted content. Historians can watch the History Channel, epicures ~~can~~ tune into The

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and message boards. millions of Americans ~~post~~ opinions and share ideas on any topic under the sun. In ~~short~~, getting a message out to the public ~~no~~ longer requires a printing press or a broadcast license. It ~~is~~ happening every day and is available to every American with access ~~to~~ a library's computer. The U.S. Supreme Court ~~has~~ hinted ~~at~~ recognizing this change. Reno v. ACLU, 521 U.S. 844, 870 117 S.Ct. 2329, 2344 (1997) ("Through the use of chat rooms, any person with a phone line can become a town crier with a voice ~~that~~ resonates farther than it could ~~from~~ any soapbox. Through the use of Web pager, mail exploders, ~~and~~ newsgroups, the same individual ~~can~~ become a pamphleteer."). See also, National A-I Advenisine, Inc., et. al v. Network Solutions, Inc., 121 F. Supp. 2d 156, 172 (D.N.H. 2000) ("Few would deny ~~that~~ features of the Internet, such as the Worldwide Web, chat rooms, bulletin board services, and newsgroups, have become a forum for public debate.").

**Second**, if ~~there is~~ a debate ~~to~~ be heard or a message ~~to~~ be sent, the local newspapers ~~and~~ broadcast stations will see it is brought to the public. In an environment with ~~so~~ many choices and ~~so~~ many media outlets, even if one newspaper and broadcast station report a story the ~~same~~ way, other local voices will report it differently.

<sup>166</sup> 1998 Biennial Regulatory Review, 15 FCC Red. at 11150 (2000).

Food Network or the **Home &** Garden channel. golfers can commiserate on The Golf Channel, and sports fanatics *can* inundate *their senses* with ESPN, ESPN2, ESPN*News*, **ESPN** Classic. CNN/SI or one of the many regional **sports** networks available.

Even within a single company, speaking in one voice is no longer enough. **In** Chicago, Tribune publishes the Chicago **Tribune**, a **mass** market daily, but also publishes and distributes *Exito*, a Spanish language weekly, *Relcon*, a real estate supplement, **Silicon** Prairie, a weekly magazine about technology in the Midwest, and *BlackVoices Quarterly*, a quarterly magazine **directed** to African Americans. Each publication is operated with editorial independence and each **has** its own staff of reporters and editors. The existence of myriad different publications illustrates the **need** to reach distinct demographics within the marketplace and common ownership only enhances the ability to do so.<sup>167</sup>

As the market fragments, Tribune is driven to provide more diverse content – content that will attract readers and advertisers. **As** a result, the Rule is **not** necessary to preserve diversity; if the Commission would allow the market to Function, our diverse culture will preserve diversity **on** its own.

### 3. Tribune's newspapers and television stations **reach** different demographics.

Where there is little overlap between **the** readers of a newspaper and the viewers of a commonly-owned television station, any potential harm resulting from common ownership is reduced **because** the views being expressed are falling on different **eyes and** ears.<sup>168</sup> In 2001, **the** facts show

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<sup>167</sup> The same is **true on** cable where **The** Food Network and Home & Garden Television have **the** same primary owner. The **E.W.** Scripps Co., a newspaper publisher. See the **E.W.** Scripps Co., 2000 Annual Report, Form 10-K (Dec. 31, 2000) available at [www.scripps.com](http://www.scripps.com). **In** addition, the same demand for local content is why *Chicago Tribune* and other Tribune newspapers **spend time and money on zoned** editions giving readers **content** and advertising more centered in their communities. It is why the number **of** weeklies and community newspaper has increased in the last 10 years.

<sup>168</sup> See, Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 100 FCC 2d 17.25-26, recon. granted in part and denied in part, 100 FCC 2d 74 (1985) ("Prohibition of . . . newspaper and television, and radio and television **cross** ownership in **the same** market would make little sense **unless** these different media were important substitutes for each other."); Review of the Commission's Regulations Governine Television Broadcasdnq, 10 FCC Red. 3524, 3555 (1995).

there is little overlap. In New York, for example, only 7.2% of adults 18 or older both read *Newsday* and watch WPIX.<sup>169</sup> In Los Angeles, only 18.8% both read the *Los Angeles Times* and watch *KTLA*. In Chicago, only **26.5%** both read the Chicago *Tribune* and watch WGN-TV. In South Florida, only 9% read the *Sun-Sentinel* and watch WBZL. In each market, far more watch TV than read the newspaper,'" and as a result, allowing the newspaper to contribute to the station's newscast will introduce a new voice to the majority of viewers.

#### 4. Common ownership does not mean common viewpoints.

The myth that common ownership will result in common viewpoints is rooted in the faulty perception that broadcast stations routinely express opinion, either directly or through choices in programming. This is misguided for many reasons. First, the number of voices in a market is not affected by whether a station airs *Dawson's Creek*, *Who Wants to Be a Millionaire*, *Moesha*, *Uga Uga*, or a telecast of *Major League Baseball*. Moreover, non-news programming decisions are mostly cost-based and market-driven. The modicum of opinion exercised in choosing programming reflects economic considerations far more than any viewpoint bias. Therefore, the need to protect diversity among entertainment or sports programs does not amount to a justification for the Rule."

Second, television stations rarely editorialize. In the November, 2000, elections, for example, none of Tribune's television stations endorsed candidates for elective office. Even in the rare

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<sup>169</sup> For Chicago and New York numbers, see, The Media Audit, July-August, 2001; For Los Angeles numbers, see, The Media Audit, March-April, 2001; For Miami-Ft. Lauderdale numbers, see, The Media Audit, June-July, 2001. In each case, daily newspaper reach defined as "read one or more in the past five weekdays." Television reach defined as "viewed over the past seven days." The number of persons who both read the newspaper and view local news on the station would be even less. Geographic area is defined by Media Audit as its metropolitan statistical area, which may differ from the DMA and/or the area defined by the U.S. Census.

<sup>170</sup> For example, WPIX in New York reaches 7.7 million people throughout Manhattan and the greater New York area, whereas *Newsday* reaches just 1.7 million. WGN-TV reaches 4.6 million people in Chicago; the *Chicago Tribune's* weekday reach is just 2.4 million. See, The Media Audit, July-August, 2001.

<sup>171</sup> See, NPRM, ¶ 40 (diversity of viewpoints in local news presentation is at the heart of the Commission's diversity goal), citing, *Local TV Ownership Report and Order*, 14 FCC Red. at 12933, ¶ 66.

cases where a station expresses an opinion, that opinion is **not** necessarily influenced by common ownership with a newspaper. If one were to believe common ownership begets common viewpoints, it would be expected that each of Tribune's newspapers would endorse the **same** political candidate. That was not the case in the **2000** presidential election, in which six of Tribune's daily newspapers endorsed President Bush, three endorsed then-Vice President Gore, and two declined to endorse either candidate. Some Tribune-owned weekly newspapers even endorsed Ralph Nader. **As** with all editorial decisions at Tribune media outlets, these decisions were made by the local operators and emphasized local issues and **perspectives**.<sup>172</sup> The Commission recognized **this** independence in the radio context when it relaxed the Seven Station Rule in **1984**: "We believe that, in general, decisions concerning local coverage are made by individual stations, whether affiliated or network **owned**."<sup>173</sup>

Finally, even if the fear of cross-ownership justified a **need** to protect diversity, regulating ownership is an ineffective means of achieving that goal. **Banning** common ownership leads to a diversity of owners, but does little to create a diversity of viewpoints. One **need** only remember the phalanx of helicopters that followed **O.J.**Simpson's Ford Bronco down the freeways of Southern California to illustrate how competition **among** broadcast media leads to uniformity, not diversity. **As** Chairman Powell notes, "Different owners may have different perspectives, but they probably have **more** in common **as** commercial interests than not, for each must compete for the maximum audience share to remain profitable." That is, most television newscasts will broadcast the major stories in the

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<sup>172</sup> Amendment of Section 73.3555 (Multiple Ownership of **AM, FM**, 100 F.C.C.2d 17, 51 (1984). See id at 39 (citing uncontroverted evidence **that** group-owned stations which do editorialize "make basic **reporting** and **coverage** decisions on an autonomous basis"). **The** analysis **and** the practical **reality** are **no** different here.

<sup>173</sup> Indeed, decisions about content at Tribune media are all made locally and Tribune media routinely criticize their sister operations and their corporate parent. Tribune-owned Chicago Cubs baseball team is a frequent target. Tribune's newspaper media reporters critique the programming on Tribune-owned television stations. Following the merger of Tribune and the former Timer-Mirror companies, *Los Angeles Times* newspaper columnists lampooned the corporate ownership. See, e.g., Howard Rosenberg, Mergers *Make for Strained Bedfellows*, *Los Angeles Times*, March 15, 2000, at F1.

<sup>174</sup> 1998 Biennial Regulatory Review, 15 FCC Red. at 11149 (2000).

marketplace because they are trying to reach the broadest audiences. Common ownership increases the chance they will provide content to niche demographics and therefore depart from the mainstream

For these reasons, consumers in markets where cross-ownership exists do not perceive a lack of voices. In Chicago, where Tribune has owned and operated a newspaper, a television station, and a radio station for 53 years, competition for audience share remains fierce and there are no complaints about the lack of viewpoint diversity. To the contrary, common ownership has given a local flavor to news and programming of WGN-TV and has allowed both the stations and the newspaper to better become a part of the community they serve. Neither Tribune nor the Commission has received complaints about the common ownership of WGN-TV, WGN(AM) and the *Chicago Tribune*.

**B. The Rule actually harms diversity by reducing local news and public interest programming.**

Beyond being unnecessary and ineffective, the Rule is actually detrimental to the most important programming, local news and public interest programs. The quality of local news and public interest programming will increase with common ownership, and decline where that ownership is banned.

**1. The Rule denies ownership of broadcast stations by the organizations most capable of, and dedicated to, covering local news.**

In 2000, following years of persistent inquiries by Tribune's newspaper publishers, Tribune Company was honored to be one of the first two US newspaper publishers to open a news bureau in Havana, Cuba.<sup>175</sup> Coverage from Cuba is of extreme interest to the large Cuban-American population in South Florida, many of whom left their families and friends to seek opportunities in the United States. Tribune's Sun-Sentinel assigned veteran journalist Vanessa Bauza as its resident Havana correspondent, and since the spring of 2001, Bauza has provided in-depth reports on a variety of topics of interest to the Cuban-American population in South Florida. Her reports have included Cuban

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<sup>175</sup>The Associated Press, *Tribune Co., Dallas Morning News Opening Havana Bureaus*, Jan. 8, 2001, available on LexisNexis. ("They join the AP and CNN as the only US media permanently operating in Havana.")

reaction to the September 11 attacks, the state of the Cuban economy, immigration dynamics, Cuban President Fidel Castro's health, a teacher shortage in Cuba, and follow-up stories on the widely watched Elian Gonzales custody battle. These unique stories are of particular interest to South Florida's large Cuban population. They were created by a Tribune newspaper that has invested heavily by stationing a reporter in Cuba. But despite Tribune's investment in developing these stories, their reach is limited to print media. The Rule prevents Bauza from reporting on Tribune's WBZL. And so, while Fidel Castro prevents most local broadcasters from providing local coverage from Cuba,<sup>176</sup> Tribune's WBZL could provide such coverage using the resources of the *Sun-Sentinel*, if not for the Rule

Similarly, in Hartford, residents can get newscasts produced by major networks located in New York. They can choose 24-hour cable newscasts produced in Washington, D.C. and Atlanta. They can even view international news produced in Europe and Asia. But unless the Rule is changed, they will not be able to watch a local newscast produced under common ownership with their local newspaper - a newspaper that has been published in their community since before the American Revolution.'"

These unfortunate results prove the Rule has outlived whatever usefulness it ever had. As the Commission knows and has cited, 70% of American adults get most of their news today from television - more than twice the number that list newspapers as their main news source.'" In the aftermath of the September 11 terrorist attacks, fully 81% of Americans say they get most of their

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<sup>176</sup> While Cuba occasionally admits American journalists to the island to report, such instances are ad hoc and subject to the whim of the Cuban government.

<sup>177</sup> *The Hartford Courant* is the nation's oldest newspaper in continuous publication. It was first published as a weekly paper in 1764. See, *The Hartford Courant*, About Us, available at [www.hartfordcourant.com/about](http://www.hartfordcourant.com/about). In Hartford, Tribune is permitted under applicable Commission policy to operate both *The Hartford Courant* and local television stations only until the next station license renewal date.

<sup>178</sup> See, Television Ownership Report & Order: Television Satellite Stations Review of Policy and Rules, 14 FCC Rcd. 12903, 12912 & n.34, 12934 & n.119 (1999) (citing Roper Starch Worldwide, Inc., *America's Watching*, (March/April, 1997)).

information from television. and about 11% from **radio**.<sup>179</sup> The news staff of a broadcast station is typically only a fraction of that employed by a daily newspaper to cover the issues of the day. ~~in~~ **the 25** largest **U.S.** markets, the television news staff is estimated to be less than 81 people on average.''' ~~In~~ a DMA the size of Newport News, Virginia (No. 41). the average station has a news staff of less than 40.<sup>181</sup> News operations at **U.S.** radio stations are even smaller - or non-existent.''' **As** an alternative, these stations turn to national networks **and** out-of-town entities to provide national news coverage and broadcast feeds. Reports from ABC, **CBS**. NBC and CNN stream onto the local stations, but content from the local newspaper does not.

By contrast, providing consumers with local. national and international news through a local perspective is the tradition and primary mission of the daily newspaper. The average newspaper in a major **U.S.** city devotes hundreds of reporters and editors to this cause. The *Chicago Tribune* employs more than 650 editorial staffers **and** hundreds of freelancers to gather and write news of local interest. ~~In~~ **Los** Angeles, the numbers are even higher - 1,130 editorial staff at the *Los Angeles Times*. Even in the smaller markets, the **size** of Tribune's newsgathering operations ~~is~~ significant. ~~In~~ Newport News, for example, the *Daily Press* employs 155 full-time editorial staff.

When allowed, newspaper contribute unique resources to the local newscasts of sister Stations. ~~Some~~ examples:

- In 1999, *Chicago Tribune* reporters looked at all **285** death penalty cases in Illinois **since** capital punishment was reinstated. The newspaper's series raised numerous troubling questions about

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<sup>179</sup> Pew Internet and American Life Project, *Now Americans Used the Internet After the Terror Attack*, at 2 (Sept. 15, 2001), available at <http://www.pewinternet.org/reports/toc.asp/?Report=45>.

<sup>180</sup> Vernon Stone, *News Operations at U.S. TV Stations*, Missouri School of Journalism (Updated 2001), available at <http://web.missouri.edu/~jourvs/gtvops.html>.

<sup>181</sup> Vernon Stone, *News Operations at U.S. TV Stations*, Missouri School of Journalism (Updated 2001), available at <http://web.missouri.edu/~jourvs/gtvops.html>.

<sup>182</sup> Vernon Stone, *News Operations at U.S. Radio Stations*, Missouri School of Journalism (Updated 2001), available at <http://web.missouri.edu/~jourvs/graops.html>.

how the death sentence was applied in Illinois. It was picked up by the television throughout Chicago, but aired first and most dramatically on WGN-TV. Early Governor George Ryan imposed a moratorium on the death penalty in Illinois; *Chicago Tribune* series helped demonstrate the unfairness and unreliability of

- In Hartford. Tribune-owned WTIC-TV wanted to investigate whether state-licensed contractors, whose work regularly put them inside customers' homes, had been convicted as sexual offenders. The television station obtained the databases of state-licensed contractors and of convicted Connecticut sexual offenders, but did not have the computer expertise or the resources to cross-match them. The newspaper had experts in computer-assisted reporting that could make the comparison in a matter of hours. Working together, the station was able to get the story it needed. The newspaper then separately expanded its analysis to include all convicted felons in the state.<sup>183</sup> As a result of the story - a story the station could not have told on its own - the Connecticut Department of Consumer Protection promised a thorough review.
- In New York, following the September 11 tragedy, WPIX broadcast regular live phone reports from *Newsday* reporter Edward A. Gargan in Pakistan. While network coverage has been available on other New York television stations, WPIX offers its viewers an independent voice with a local perspective. Gargan is not alone. Reporter Michael Lev of the *Chicago Tribune* appears live from overseas on WGN-TV. Many other Tribune reporters appear on the Tribune stations in their markets, offering viewers a local perspective and an alternative to the network coverage. The bottom line is more in-depth, substantive and valuable coverage for Tribune television viewers from Tribune newspaper reporters and editors. **Tribune newspapers have 45 reporters stationed internationally, covering issues around the globe. Tribune television stations have no reporters outside the U.S.**
- In Los Angeles, the *Los Angeles Times* led an indepth investigation into allegations that some of the nation's largest natural gas companies triggered the California energy crisis by blocking construction of key gas pipelines in 1996. As a result of the newspaper's efforts, five Tribune television stations (in Los Angeles, Sacramento, San Diego, Houston and Dallas) were able to use the sources and information gathered to produce their own stories, with more substantive and timely content. KTLA added video, KTXL in Sacramento contributed an interview with California's governor Gray Davis, and KHQB in Houston interviewed El Paso energy officials. All three stations made their reports available to the other stations via satellite feeds. Combined with the reporting of the L.A. *Times*, the California and Texas television markets had in-depth and powerful content.
- In the spring of 2001, Michael Lev, *Chicago Tribune* Beijing correspondent, provided detailed coverage of the downing of a U.S. plane in China not only to readers of the *Chicago Tribune*, but to viewers of WGN-TV and CLTV, listeners of WGN Radio and users of chicagotribune.com. Lev gave WGN-TV, CLTV, WGN Radio and chicagotribune.com a resource in China that none of them could have afforded on their own. Absent Lev's reporting, each of these entities would likely have used wire reports or network coverage with the same content available on other channels and media outlets in Chicago. Instead, Lev provided

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<sup>183</sup> The TV and newspaper stories thus were slightly different in this regard: the television story focused largely on the sexual offenders while the newspaper included more on other kinds of felons.

comprehensive, up-to-date coverage with a unique, Chicago voice. and Tribune made it available in a variety of media so Chicago residents had the latest information,

- In New York, *Newsday* and WPIX shared resources to plan and produce a prime-time debate for New York's five Democratic mayoral candidates in this year's election. *Newsday* came up with the debate idea and because of the obvious television component, contacted WPIX. Neither the station nor the newspaper could have handled the production costs on its own (and indeed no other newspaper or station in New York undertook the challenge), but the idea became more economically feasible when *Newsday* and WPIX decided to split the costs. WPIX aired the debate on August 28 and replayed it September 1. Debate stories and a full transcript of the debate were available on Newsday.com and wblt.com. Debate coverage was a front-page story in the New York Times, was covered in several of the city's other dailies and ran on the newscasts of New York's major television stations. As a result, the people of New York benefited from a chance to hear the candidates, a chance not guaranteed if *Newsday* and WPIX were not co-owned.<sup>184</sup>
- In Washington, D.C., Tribune invested several million dollars to create a unique Washington Media Center - a state-of-the-art news gathering facility that combines the Washington bureaus of its television stations and newspapers. The Media Center shares and expands the use of content the bureaus traditionally created exclusively for the television or newspaper groups and identifies ways to share costs and thus enhance coverage without sacrificing editorial independence. Today, the Media Center employs newspaper and broadcast reporters/editors who regularly collaborate and share information about developing news stories. The Media Center capitalizes on the expertise and knowledge of Tribune's newspaper writers who regularly provide additional depth and insight to the news coverage of Tribune's television news departments. This allows Tribune to provide a new independent source of national news coverage to the viewers in its markets. In addition, the combined media presence helps Tribune enhance and localize national news coverage by adding interviews with local Congressmen and Senators to supplement a basic news story, and allowing Tribune print reporters to provide additional depth and insight on stories of particular interest.

These examples, and the totality of the comprehensive coverage found in Tribune's cross-media reports of the September 11 attacks on America, provide a unique illustration of the benefits of common ownership. Each of these cross-media news reports has a common thread. It originated in whole or in part from the journalistic work of a Tribune newspaper, and therefore represented a new television news voice. These new voices would not have reached the public on

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<sup>184</sup> This example of additional broadcast airtime for Candidates seeking elective office should be applauded and encouraged. As the Commission is aware, the call for free air time to be available to candidates in the weeks prior to elections continues to be debated at length, particularly in discussions about campaign finance reform. Clearly more such air time is in the public interest. Eliminating the Rule is one way to encourage such programming, without mandating it.

television with the same depth and scope had it not been for Tribune's commitment to vibrant newspaper operations with reporters and resources throughout the community **and** around the globe.

Tribune newspaper and television reporters share story ideas and resources. Each entity makes its own decisions about whether and how to tell the story to the public, and the process helps ensure better quality journalism. Regular interaction allows each medium to do a better job of gathering news for its consumers, and helps ensure no stones fall through the cracks. Other examples of shared resources are growing: By outfitting photographers with new technology, for example, one individual can gather both video and still photographs for publication in print, on-air and online. This frees other photographers for other assignments and expands coverage.

If not freed to compete in the broadcast marketplace, newspapers must find other ways to combat the rising cost of newsgathering, including cuts in coverage. **This** is likely to mean fewer reporters and editors **and** a reduced capacity to cover the local meetings and events that are the substance of community journalism. It will mean more homogenized news coverage like that provided by wire services or on the Internet – regurgitated information and wire stories prepared by out-of-town reporters, rather **than** new information targeted to the individual interests of the local marketplace.

## **2. The rule discourages new voices in the marketplace.**

Tribune has been ~~at~~ the forefront of developing synergies between newspapers and other video programming outlets - most notably cable news channels. **These** synergies take the ~~extensive~~ content generated by a newspaper and translate it into new local video news programming that would be unavailable but for the relationship between the newspaper and the video outlet. Tribune's efforts are restricted to cable, except in Chicago, where the Commission has grandfathered Tribune's ownership of newspaper, television and radio. and in New York, Los Angeles and Hartford, where recent acquisitions will make Tribune subject to the Rule when its broadcast licenses are up for renewal. If the Commission would eliminate the Rule, more of this quality news programming will find its way to the airwaves.

Chicago is an example of how a newspaper's resources can give birth to an entirely new channel dedicated to the local marketplace. There, Tribune put together a new 24-hour-a-day all-news local cable channel known as CLTV - ChicagoLand Television News. CLTV was founded in 1992 and first appeared on television in 1993, offering some 1.6 million Chicago DMA cable television viewers their own around-the-clock news service. CLTV started slowly, as local cable systems refused to carry it in part because they doubted its viewership potential. The channel lost money for seven straight years. Yet despite more than \$60 million in losses, Tribune refused to give up on the station or its mission of delivering local news to consumers.

Today, CLTV is successful and stands on its own:

- Its election night coverage during the March, 2000, Illinois primary was watched at local campaign headquarters alongside that of the major network affiliates. Bruce Dold, *Chicago Tribune* deputy editorial page editor, joined CLTV primary night anchors Monica Schneider and Bill Moller as an in-studio analyst from 7 to 11:30 p.m. CLTV's Greg Prather co-anchored the primary night coverage from the *Chicago Tribune* newsroom, where he interviewed *Chicago Tribune* political writers Rick Pearson, Robert Becker, Susan Kuczka, Douglas Holt and Lisa Black. Prather also talked to chicagotribune.com metro editor Mark LaBian about how the Internet has made more election information available to voters. While most Chicago television stations limited their primary coverage to within their late evening newscasts, CLTV added more. Even if the newspaper reporters had appeared on other stations, it would have been for much shorter time periods and offered less in-depth information.
- In 2001, more than 40 reporters, editors, and visual journalists from the *Chicago Tribune*, WGN-TV and CLTV, worked together on a series of stories entitled, "Gateway to Gridlock," about the effect that air traffic snarls at O'Hare Airport were having on lives all over the country. Each medium contributed to the investigation and shared the results of its newsgathering, but in the delivery of the story, each communicated in the way best suited to its audience. It is impossible to conceive of such an effort without common ownership and for their effort, the story was recognized with journalism's highest honor, the Pulitzer Prize.
- CLTV features regular appearances by *Chicago Tribune* columnists and writers who prepare video versions of their popular columns or features, including daily business reports, theatre reports, movie reviews, restaurant reviews, a computer connection feature, a local community-affairs calendar, TV reviews, entertainment reviews, and regular segments on local high-school sports. CLTV also features *Chicago Tribune* reporters on a number of 30-minute programs, including *Around Chicagoland*, a recap of the week's top stories and issues; *Good Eating*, featuring content from the newspaper's food section; *Your Money*, a program on the Chicago business community and personal finance, based on a newspaper section of the same name; and *Metromix*, an entertainment program that is the companion to *Chicago Tribune's* entertainment website, Metromix.com.

For Tribune, capitalizing on its resources and reputation for excellence in newsgathering makes eminent economic sense. The *Chicago Tribune's* news operation has a staff more than ten times that of CLTV's news department and five times that of WGN-TV. This allows cost efficiencies in newsgathering operations. Newsgathering, features, commentary, specialty programs and promotion at CLTV are all built on the backbone of the *Chicago Tribune's* coverage and the extensive video resources from WGN-TV. The result is wide dissemination of a thorough analysis of local and national issues: Cross-ownership giving birth to a new voice.

Contrast this with the situation in South Florida. In 19%, when Tribune acquired Miami television station WBZL (then WDZL) as part of the Renaissance station group, the station was the seventh-rated television station in the market and carried no local news. Tribune asked for a waiver of the Rule due to the ownership of the *Sun-Sentinel* newspaper and was given temporary permission to acquire the station. However, as a condition to the approval, Tribune agreed to operate the station and the newspaper separately. That mandatory separation continues today.<sup>185</sup>

At the time Tribune acquired WBZL, the station had considered the possibility of starting a new local newscast. The start-up capital costs for a new 30-minute news broadcast were prohibitive — estimated at approximately \$1.5 to \$2 million. Included in these estimates were costs for edit- and post- production facilities (\$280,000); a fully-equipped ENG truck (\$200,000); a microwave repeater site to bring news stories into the station (\$250,000); an engineering and playback control and studio upgrade (\$500,000); and six video cameras and accessories (\$500,000). In addition to the initial capital costs, the station needed to fund an annual operating budget of approximately \$2 million to cover wages and benefits for new news employees as well as the costs of various news services.

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<sup>185</sup> On September 18, 2000, Tribune filed a petition asking the Commission to remove the mandatory separation condition. See, *Channel 39, Inc., FCC File No. BTCCT-960801LJ*. That petition conclusively demonstrated how the restriction harmed the public. It was supported by Knight-Ridder, the publisher of the Miami Herald and previously the only opponent of Cross-ownership in South Florida. To date the Commission has not acted on the petition..

Even assuming the station had the capital to launch the newscast, there was no guarantee of success. The station faced an extremely competitive news market with six different local television newscasts - four of which were affiliates of the top four national networks - and each of which was established, successful and backed by well-financed operators including General Electric/NBC, Post-Newsweek, Sunbeam, CBS and Telemundo.<sup>186</sup>

Rather than **making** the enormous capital commitment needed to launch a new newscast in these circumstances, WBZL (prior to its acquisition by Tribune) contracted with NBC-owned WTVJ to purchase a news broadcast. The 30-minute, 10p.m. news broadcast features on-air talent employed by, and stories generated by, WTVJ's news department. Under the **terms** of the contract, WTVJ controls production of the broadcast. Absent a **permanent** waiver, Tribune has little incentive to make a long-term capital investment in a WBZL newscast. Thus, instead of **launching** a new voice in the market, rich in local news content supported by the *Sun-Sentinel*, WBZL airs a newscast produced and staffed by a competitor.

The difficulty faced by WBZL in launching local news is in no way unique. While practically all television stations affiliated with the four major networks have news departments, the great majority of other television stations do not. One study found that while **98%** of ABC, NBC and CBS affiliated stations had news departments, only 36% of independently-owned stations did.<sup>187</sup> For independent stations to produce news **often** requires help, and **common** ownership offers **an** answer.

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<sup>186</sup> Barriers to entry are typically higher for UHF stations. In Miami-Ft. Lauderdale, each of the four **major** network **VHF** affiliates has a long-standing **history** with Miami viewers with operations having commenced in 1949, 1956, 1961 and 1967. By contrast, WBZL signed on Channel 39 as an independent station in 1992. By that time, competition from the cable industry was intense and growing (cable **penetration** nationally was already at 60%) and Miami-Ft. Lauderdale viewers had more than 35 video programming channels to choose from. WBZL had **no** established viewing pattern to **rely on** and, more importantly, the efficiencies available to the cable industry enabled the national cable **networks** to siphon **off some** of the traditional programming used by independent stations **to attract** audiences. For example, first-run movie packages, **once** a **good** source of alternative programming **against** network offering, had almost **completely** moved to **cable** networks by the time WBZL signed on in 1992.

<sup>187</sup> Stone, *supra* at n. 180.

Stations co-owned with the local newspaper have greater access to stories and the resources needed to cover them. By adding the resources of the newspaper, the co-owned station can do more.” It stands to reason that without the Rule’s absolute bar on cross-ownership, more independent stations could establish new local newscasts.

Moreover, the Rule sorely disadvantages the independent voices it is designed to protect. **WPIX** in New York provides an independent voice in the New York marketplace that competes with stations owned and operated by the four major networks. But those networks can pool their resources and share expenses across one or more television and/or radio stations. Even greater, the major networks are now discussing cost-sharing arrangements to further reduce expenses as they compete against each other and the independent voices in the market.’ @In these times of increased economic challenges for broadcasters, the Rule has the effect of disadvantaging the local independent voice and providing a distinct competitive advantage to the networks.

**3. We harm the fabric of our cities if we deny newspapers the right and ability to deliver news in alternative media.**

Since the founding of our country, newspapers have filled a role critical to our democracy – increasing understanding by sharing information. One of America’s first widely distributed print publications, Thomas Paine’s *Common Sense*, helped make independence a national

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<sup>188</sup> The Commission found in 1999 that there are significant efficiencies inherent in joint ownership and operation of television stations in the same market, including efficiencies related to the co-location and sharing of studio and office facilities, the sharing of administrative and technical staff, and efficiencies in advertising and news gathering. These efficiencies can contribute to programming and other benefits such as increased news and public affairs programming and improved entertainment programming, and, in some cases, can ensure the continued survival of a struggling station. Television Ownership Report and Order, 14 FCC Rod. at 12930

<sup>189</sup> Most recently, ABC and CBS announced the intention to combine newsgathering resources to reduce costs. See, e.g., Jim Rutenberg and Bill Caner, ABC and CBS Discuss Sharing of News Costs, N.Y. Times, Nov. 15, 2001, at C4. The concept that two storied network competitors would combine newsgathering resources would have been laughable in 1975, but today is simply one more indicator of the changing market conditions facing traditional media. See also, Peter Johnson, *NBC’s contract dance with Couric heats up*, USA Today, Nov. 28, 2001, at 4D (‘Bureau chiefs at CBS News and ABC News in Washington, D.C., and London have been given until next week . . . to determine whether a merger of bureaus there would save money.’)

cause by bringing together readers from Vermont to Virginia, sharing information and ideas and stirring public debate.

Today's local newspaper fills a similar role, providing a unique and critical link among our citizens, informing them about what is going on around them, and creating a sense of community. It promotes tolerance by highlighting ideas and activities shared by our diverse population. The *Chicago Tribune* is one of the few places where Chicago residents can learn in-depth what is going on in differing and often geographically distant communities and neighborhoods throughout the city. Tribune's other newspapers offer the same to readers in their communities. With circulation dropping and newspapers' most important revenue source, classified advertising, under attack from Internet operations such as monster.com (recruitment) and homestore.com (housing), newspapers must find additional ways to find a return on the cost of newsgathering or be forced to curtail coverage."

Common ownership also fosters the promotion of newspapers on television and helps increase literacy. Younger generations have led the decline in newspaper readership as they turn increasingly to television and to the Internet for news.<sup>191</sup> Where commonly-owned television stations promote their newspaper brethren, they encourage newspaper readership and can help promote newspapers to younger viewers. Reaching this younger audience and encouraging them to open the newspaper is perhaps the best way to increase newspaper literacy.

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<sup>190</sup> Classified ads are booming online, competing with the long-standing dominance of newspapers as the preferred venue, according to <[http://news.cnet.com/news/0-1005-200-8020991.html?tag=cd\\_pr](http://news.cnet.com/news/0-1005-200-8020991.html?tag=cd_pr)> Cnet. Online classified advertising revenue went up 176% in 2001, according to the <<http://www.iab.net/main/main.html>> Interactive Advertising Bureau (IAB) and consulting firm <<http://www.pwcglobal.com/>> Pricewaterhouse Coopers. "Classifieds are booming because it's the perfect application for the Internet," said Jim Nail, senior analyst at <<http://www.forrester.com/Home/0.3257,1,FF.html>> Forrester Research.

<sup>191</sup> One study, in 2000, found 36% of persons aged 18-24 reported watching local TV news 4-5 times per week, while only 24% reported reading a daily newspaper 4-5 times a week, and 23% reported using the Internet for news 4-5 times per week. Clark, Martire & Bartolomeo, Inc., *Leveraging Newspaper Assets: A Study of Changing American Media Usage Habits. 2000 Research Report*. (2000). Dramatically, only three years ago, only 7% of this age group reported visiting the Internet for local news. The dramatic increase in use of the Internet has come at the expense of both newspapers, which dropped from 33%, and television which dropped from 44%.

Common ownership thus serves the public interest by promoting the sharing of information throughout our diverse communities and helping to personalize and promote the newspaper to a wider audience. **As** we share news about crime and families, about schools and sports, about successes and tragedy, and about the people **and** places we live, we strengthen our communities and help increase understanding that is vital in the fight against parochialism **and** segregation. These important and unifying roles greatly serve the public interest.

**V. JOINT VENTURES ARE NO SUBSTITUTE FOR COMMON OWNERSHIP.**

Many of Tribune's newspapers in markets without a commonly-owned television station participate in informal alliances with separately-owned stations. These alliances are typically characterized by little or **no** up-front capital investment and short-notice termination rights. **As** a result, the resource-laden newspaper **has** little incentive to make any long-term investment in developing a shared newsgathering operation or creating new ways to reach its audience. More importantly, because the alliances generally involve well-established stations with substantial news departments (there is little, if any, incentive to "share" resources with a station that has **no** newsroom), the alliances produce far fewer instances of new local news programming. **As** described below, these alliances do not replicate the public interest **benefits** of cross-ownership.

**A. Lack of capital investment.** Without agreements that commit the parties to work together for multiple years, newspapers **and** separately-owned television stations are reluctant to invest substantially in the training **and** equipment necessary to enhance the television newscast. Tribune invested in excess of \$2 million to construct a state-of-the-art television newsroom at the **Chicago** Tribune for use by the newspaper, WGN-TV and CLTV. This facility includes multiple cameras, sophisticated fiber and file-server systems, and all digital video delivery system for broadcast, cable and the Internet. Using this equipment, print reports can quickly be converted into scripts and used to supplement on-air reporting. By contrast, in most instances where Tribune **has** partnered, the

partnership involves little more than placing a single camera in the corner of the print newsroom and far less newsroom content is shared over the air.

**The** fate **of** the fabled City News Bureau of Chicago further illustrates how economic reality can converge to destroy even the most long-standing partnerships. For 108 years, City News served **as** a venerated training ground for reporters and a source of **unique** local coverage renowned for its factual accuracy and detail. It was a cooperative funded by a **number** of Chicago newspapers **and** television stations, and shared its data among all members. Unlike a wire service that provides stories for broadcast or publication, newspaper **journalists** used City News primarily for leads, then developed their own stories based on the data City News supplied. **Thus** City News did not jeopardize the diversity **of** viewpoints in the marketplace, but in fact provided a separate voice, covering stories that newspaper and television stations could not justify individually. But ultimately, **as** the costs of newsgathering increased and budgets tightened, members withdrew from City News to turn their limited financial resources to projects they owned. The City News Bureau -perhaps the ultimate partnership in Chicago news - was ultimately undone by **modern** newsroom economics. It closed its doors **in 1998**.

**B. Lack of human-resource investment and coordination.** Closely related to capital investment is investment in the training **and** development **of** multimedia journalists **and** support staff. Each Tribune newspaper has **a** high-level editor dedicated to the electronic publishing of its journalism. **In** Chicago, the multimedia staff includes journalists responsible for developing television, radio and Internet content. Videographers, video editing specialists, television news producers and Internet news producers work together on breaking news around the clock. **The** expertise required to deliver breaking news and stories designed for the television and Internet consumer is markedly different than that used strictly in print.

By contrast, **in** Tribune's partnerships, lack of commitment to training by general managers, editors and news directors often scuttles the relationship. Print and broadcast newsrooms are

inherently different: They have conflicting deadlines, vastly different lead-times to develop stories, different editing procedures, and separate priorities about the nature of the stories that best serve their audiences. The audiences themselves **may** be profoundly different. demographically and geographically. Coordinating this effort requires a **team** of editors and reporters with a ~~common~~ purpose to effectively marshal the resources of print and broadcast reporters and deliver the news to consumers in the most effective means. Without the right leadership, skill and commitment from editors, conflicts that stem from these issues **can** destroy or inhibit the effectiveness of a partnership when it matters most.

Often, cooperation occurs on mundane subjects but competitive fissures or disconnected operations prevent coordination when a significant story breaks. For example, coverage of the September 11 events played out in multi-media on Tribune television stations in New York, Chicago and **Los** Angeles. enhanced **as** a result of common ownership. Within hours of the attacks on the World Trade Center, *Newsday*'s Susan Harrington and Diane Goldie were **on** the telephone with Tribune television stations KTLA in **Los** Angeles and **WGN-TV** in Chicago. providing eyewitness accounts of the tragedy. In the days that ensued, Tribune newspaper reporters were invited by the news departments at Tribune television and radio stations to contribute to the broadcast coverage. Reporters from Tribune's *Orlando Sentinel* gave updates **on** New York's WPIX regarding the status of the investigation into the attacks and the tracking of **the** terrorists in Florida. Chicago Tribune reporters with aviation expertise reported about the effect of the attacks **on** the nation's air traffic. In South Florida, however, where CBS's WFOR and Tribune's *Sun-Sentinel* have a news partnership agreement, the ability to work together was severely limited, in part because WFOR elected to carry network coverage.

Efficient coordinated sales operations **can** benefit both partners. but also require investments of time and **resources** to develop. Separate companies, with separate compensation and benefit plans. face significant hurdles in aligning management incentives, **sales** commissions and business unit goals. By contrast, Tribune has the ability to align compensation fairly across its different

media, and has dedicated resources to developing multimedia editorial and sales teams to capitalize on economic efficiencies.

**C. Cross-media journalism requires common goals and incentives.** Tribune's strategic commitment to multimedia results in quality journalism enhanced by multiple outlets. In markets where it owns both a television station and newspaper, Tribune has the highest incentives to reconcile conflicting reponing priorities, resource demands and deadline pressures of its print and television newsroom. Simply put. Tribune **wants** its newspapers and broadcast stations **to be** successful **and** to have the greatest impact on the local community. Tribune editors **are** committed to using multimedia journalism **to** achieve these **goals**, and by delivering stories over electronic media, information **can be** delivered to more people. This extended reach **enables** the story to **make** a bigger difference in the community.

Multimedia journalism is not easy: It requires management focus, resource commitments, new skills. training and a deep understanding of the local community. It also requires high levels of trust and confidentiality while a story is being developed. **This** commitment **to** succeed does not often survive in ad-hoc partnerships, but it is at the center of the public benefit newspaper/broadcast cross-ownership provides to the television viewer and radio listener.

#### **VI. THE RULE IS UNCONSTITUTIONAL.**

Given the tremendous breadth of competing options in today's media marketplace, broadcast regulations need ~~no~~ deference under Constitutional scrutiny. When evaluated against the same Constitutional standards applied to cable and other non-broadcast media. the Rule must fail since it **cannot** meet the requisite Constitutional showing that it "advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary **to** further those interests." <sup>192</sup>

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<sup>192</sup> Turner Broadcastine Sys., Inc. v. FCC, 520 U.S. 180, 189 (1997) ("Turner II")

- A. The deferential standard of renew originally applied to the Rule was based on the assumption there ~~was~~ scarcity in the local media marketplace.

The Rule was originally held to be Constitutional in Red Lion Broadcasting Co. v.

FCC.<sup>193</sup> This deferential standard of review ~~was~~ based ~~on~~ the Supreme Court's perception that there was functional scarcity in the broadcast media. In Red Lion, the Supreme Court upheld the Constitutionality of the Commission's Fairness Doctrine, pursuant to which broadcasters were required to present a balanced discussion of matters of public concern.<sup>194</sup> The Court focused on the scarcity of broadcast frequencies, finding,

Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit ~~an~~ ~~unabridgeable~~ First Amendment right ~~to~~ broadcast comparable to the right of every individual to speak, write, or publish.''

The Court further reasoned, "[b]ecause of the scarcity [in the broadcast spectrum], the Government is permitted to put restraints ~~on~~ licensees in favor of others whose views should ~~be~~ expressed ~~on~~ this unique medium."<sup>195</sup> Subsequent cases confirm broadcast spectrum scarcity is the doctrinal justification for applying a more lenient standard of review to broadcast regulations than would otherwise be applied to restrictions ~~on~~ speech like the Rule.<sup>197</sup>

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<sup>193</sup> 395 U.S. 367 (1969).

<sup>194</sup> Id. at 369. The Commission has stopped enforcing the Fairness Doctrine entirely. See Inquiry Into the Fairness Doctrine, 102 FCC 2d. 142 (1985). The Personal Attack and Political Editorializing rules, companions of the Fairness Doctrine, were struck down by the D.C. Circuit Coun of appeals within the last year. See Radio-Television News Directors Ass'n v. FCC, 184 F.3d. 872 (1999). See also, Repeal or Modification of the Personal Attack and Political Editorial Rules, 15 FCC Red. 19973 (2000).

<sup>195</sup> Id. at 388-89.

<sup>196</sup> Id. at 390.

<sup>197</sup> See, e.g., Turner Broadcasting System Inc. v. F.C.C., 512 US 622 at 640 (1994), ("Turner I") 512 U.S. at 640 (essential to the Red Lion doctrine ~~are~~ the "special physical characteristics of broadcast transmission"); FCC v. League of Women Voters, 468 U.S. 364. 377 (1984); Metro Broadcasting Inc. v. FCC, 491 U.S. 547. 566-67 (1990), ~~overruled on other grounds~~, Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995); News America Publish., Inc. v. FCC, 844 F.2d 800, 811 (D.C. Cir. 1988) ("The Supreme Coun has rested this lesser protection on the scarcity of broadcast frequencies . . . and has recognized that new technology may ~~render~~ the doctrine ~~obsolete~~") (internal quotations and citations omitted); Time

Since the scarcity rationale was first invoked, the Supreme Court has recognized subsequent technological developments might overtake the doctrine. "[T]he broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence."<sup>198</sup> Thus, the Supreme Court has expressly stated its willingness to reconsider the Red Lion standard upon "some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required."''

**B. The Commission has recognized scarcity no longer exists as it has eliminated other structural rules.**

The Supreme Court's market prediction has been realized, and the Commission itself has recognized scarcity is no longer relevant. As highlighted above, since Red Lion was decided in 1969 and the Rule was promulgated in 1975, the technology for the delivery of video programming has

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Warner Entertainment v. FCC, 105 F.3d 723, 724 & n. 2 (D.C. Cir. 1997) (per curiam) (Williams, J., dissenting),

The Supreme Court has recognized that the "pervasiveness" of and children's unique access to broadcasting justified the Commission's prohibition on indecent material during hours when children might be listening or watching. FCC v. Pacifica Found., 438 U.S. 726, 748-50 (1978); see also Denver Area Educational Telecommunications Consortium v. FCC, 518 U.S. 127 (1996) (applying Pacifica rationale to cable television). However, this rationale for regulation has never been accepted except in the context of limitations on indecent expression, which are not implicated here. FCC v. League of Women Voters, 468 U.S. 364, 380 n. 13 (1984) (overturning FCC regulation prohibiting noncommercial stations from presenting editorials and distinguishing Pacifica because "we are faced not with indecent expression" and "no claim is made by the Government that the expression of editorial opinion by noncommercial stations will create a substantial 'nuisance' of the kind addressed in [Pacifica]"). Thus, the "pervasive nuisance" rationale does not provide a constitutional theory in support of a lenient standard of review for broadcast ownership — as opposed to decency — restrictions.

<sup>198</sup> Columbia Broadcast Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 102 (1973).

<sup>199</sup> FCC v. League of Women Voters, 468 U.S. at 376-77 n.11 (1984). See also Arkansas AFL-CIO v. FCC, 11 F.3d 1430, 1443 (8th Cir. 1993) (Arnold, J., concurring) (developments since Red Lion "raise a significant possibility that the First Amendment balance struck in Red Lion would look different today"); Syracuse Peace Council v. FCC, 861 F.2d 654, 681 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990) (Judge Starr, concurring) ("[U]nder the Red Lion framework . . . the constitutionality of the Fairness Doctrine is linked in part to technological developments (and behavior) in the communications marketplace?"; Branch v. FCC, 874 F.2d 37, 50 (D.C. Cir. 1987) (concluding that the FCC has already sent the "signal" mentioned in FCC v. League of Women Voters by deciding that the Fairness Doctrine was unconstitutional and should be abandoned); News America Publishing, Inc. v. FCC, 844 F.2d 800 (D.C. Cir. 1988).